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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

CITY OF CHICAGO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-2167

CITY OF CHICAGO, PLAINTIFF-APPELLEE

v.

UNITED STATES DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANT-APPELLANT

Argued Jan. 16, 2002
Decided April 25, 2002

Before: BAUER, ROVNER and WILLIAMS,
Circuit Judges.

BAUER, Circuit Judge.

The City of Chicago (City) brought an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, against the United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms (ATF), seeking certain records maintained by ATF regarding the multiple sales of handguns and the tracing of firearms involved in crimes. Both parties moved for summary judgment on the issue of whether certain FOIA exemptions protected some of the requested data from disclosure. The district court granted summary

judgment in favor of the City and held that none of the FOIA exemptions permit ATF to withhold any of the requested records. ATF appealed this decision. For the following reasons, we affirm.

BACKGROUND

On November 12, 1998, the City filed a civil suit against certain manufacturers, distributors and dealers of firearms in Illinois state court. The suit charges those defendants with creating and maintaining a public nuisance in the city by intentionally marketing firearms to city residents and others likely to use or possess the weapons in the city, where essentially possession of any firearm except long-barrel rifles and shotguns is illegal. The suit complains that the defendants' conduct undermines the City's ability to enforce its gun control ordinances and the City's theory of liability rests in part on the defendants' distribution practices. The City seeks injunctive relief, as well as compensatory and punitive damages for the costs that the City incurs as a result of the presence of illegal guns in Chicago.

In furtherance of the City's state court litigation and in order to gain information about local and nationwide firearm distribution patterns, the City sought certain records from ATF. ATF is a criminal and regulatory enforcement agency within the Department of Treasury and is responsible for, among other things, enforcing federal firearms laws, including the Gun Control Act. Under this Act, firearms manufacturers, importers, dealers or collectors are required to keep records of firearms acquisition and disposition and make such records available to ATF under certain circumstances. These records must contain the name, address, date and place of birth, height, weight and race of any

firearm transferee without a firearm license. The records also identify the transferred firearm by manufacturer, model and serial number.

ATF maintains these records in comprehensive databases. The City sought information from two particular ATF databases: the Trace Database and the Multiple Sales Database. The Trace Database consists of information compiled when a law enforcement agency contacts ATF and requests that a trace be conducted on a weapon that the law enforcement agency recovered in connection with a crime. ATF then uses the serial number on the weapon to determine its manufacturer. ATF contacts the manufacturer to determine to which dealer or distributor the weapon was sold. The tracing then continues down the line until ATF discovers the name of the individual consumer who purchased the gun. This information is then relayed back to the law enforcement agency that made the initial inquiry, and ATF inputs this data into the Trace Database.

The Multiple Sales Database is compiled of information submitted to ATF by firearm dealers. Pursuant to the mandates of the Gun Control Act, when a non-licensed individual purchases more than one gun from the same dealer within a five day period, the dealer is required to inform ATF. 18 U.S.C. § 923(g)(3)(A). ATF then inputs this information into the Multiple Sales Database.

On March 3, 2000, the City submitted a formal FOIA request to ATF, seeking certain records on firearm traces and multiple sales both nationwide and in Chicago from 1992 to the present. On March 8, in response to the City's FOIA request, ATF provided trace data for firearms recovered in Chicago and multiple

sales data for the Chicago area for only some of the requested time frame. Eventually, ATF provided the City with some of the requested nationwide records, but still refused to disclose significant information in these records. In particular, ATF withheld all names and addresses of manufacturers, dealers, purchasers and possessors from both the Trace Database and the Multiple Sales Database records. ATF also withheld the weapon recovery locations, serial number and manufacture date from records in the Trace Database. In addition, the purchased weapon serial numbers, weapon types, number of firearms and transaction dates were withheld from the Multiple Sales Database records.

According to ATF, it is agency policy to withhold certain information in both the Trace and Multiple Sales Databases for a certain number of years in order to protect against the possibility of interference with an open or prospective investigation. In addition, ATF withholds indefinitely the individual names and addresses of all firearm purchasers, manufacturers, dealers and importers in both databases for privacy reasons. ATF claims that FOIA Exemptions 6, 7(A) and 7(C) allow for the withholding of this information for privacy and law enforcement purposes.

On June 7, 2000, the City filed suit against ATF in federal district court under FOIA, seeking disclosure of the withheld information. Both parties filed motions for summary judgment, including affidavits in support of their respective positions. The district court ordered a hearing on the issue of whether the FOIA exemptions warranted ATF's withholding of the records. Several witnesses for both parties testified as to these issues at the hearing.

On March 6, 2001, the district court granted summary judgment in favor of the City, holding that FOIA requires full disclosure of all requested data to the City because ATF failed to satisfy its burden to demonstrate that the requested information was properly withheld under Exemptions 6, 7(A) or 7(C). In the alternative, the district court held that even if the identity of specific individuals or weapons falls within the scope of any FOIA exemption, this information is reasonably segregable from the remainder of the records and ATF could easily delete or encrypt the sensitive portions while maintaining the integrity of the remainder of the information. ATF appeals this decision.

DISCUSSION

ATF challenges the district court's decision to grant the City's motion for summary judgment. We review the district court's grant of summary judgment with respect to a FOIA request by determining first, whether the district court had an adequate factual basis to make its decision and, if so, whether its decision was clearly erroneous. *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1038 (7th Cir. 1998). Because both parties in the instant case provided the district court with numerous affidavits, as well as witness testimony at an evidentiary hearing, we conclude that the district court did have an adequate factual basis to make its decision. As such, we will overturn its decision only upon a finding of clear error. *Id.*

FOIA requires the Department of Treasury, ATF, and other government agencies to make their records available to the public. Its basic purpose is to "ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber*

Co., 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L.Ed.2d 159 (1978). In enacting FOIA, Congress sought to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Rose v. Dept. of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974). While disclosure is the dominant objective of FOIA, there are a number of exemptions from the statute's broad reach. *United States Dept. of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494, 114 S. Ct. 1006, 127 L.Ed.2d 325 (1994). Such exemptions are to be narrowly construed in order to further the statute's broad disclosure policy. *In Re Wade*, 969 F.2d 241, 246 (7th Cir. 1992). A government agency bears the burden of justifying a decision to withhold requested information pursuant to a FOIA exemption. *Solar Sources*, 142 F.2d at 1037.

A. Exemption 7(A)

Among the list of FOIA exemptions, 7(A) shields from disclosure records "compiled for law enforcement purposes but only to the extent that the production of such law enforcement records . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). ATF first argues on appeal that the district court erred in failing to recognize that Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), permits ATF to withhold certain information from the City because such records are sensitive in nature and could potentially interfere with law enforcement proceedings. We disagree.

We note at the outset that ATF is mistaken in its assertion that because it is a government agency the district court was required to give deference to its reasons for non-disclosure. It is true that we do not question the expertise of the agency or its reasons for

withholding documents where nothing appears to raise the issue of good faith. *Maroscia v. Levi*, 569 F.2d 1000, 1003 (7th Cir. 1977); *In re Wade*, 969 F.2d at 246. However, this deference is limited only to situations in which the agency has demonstrated with specificity a logical connection between the information withheld and identified investigations, and where the agency has submitted uncontroverted affidavits. *Am. Friends Serv. Comm. v. Dept. of Def.*, 831 F.2d 441, 444 (3d Cir. 1987). These two limitations have not been met here. Instead, ATF failed to identify any particular ongoing investigations, and the City put the veracity of ATF's affidavits into controversy by submitting their own affidavits and testimony. As a result, the district court was correct in refusing to defer to ATF's submissions on its reasons for withholding the documents.

In enacting Exemption 7(A), "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case." *Robbins Tire*, 437 U.S. at 224, 98 S. Ct. 2311. However, Congress did not intend to preclude disclosure of any investigatory records; rather, Congress sought to protect against interference with investigatory files prior to the completion of an actual or contemplated enforcement proceeding. *Id.* at 232, 98 S. Ct. 2311.

Utilizing this framework, we conclude that ATF has failed to demonstrate that Exemption 7(A) shields the requested data from disclosure. ATF argues that it has demonstrated with "concrete examples" the way in which the premature public release of the requested data could interfere with enforcement proceedings. However, the potential for interference set forth by

ATF is only speculative and not the "actual, contemplated enforcement proceeding" that Congress had in mind when drafting Exemption 7(A). *Robbins Tire*, 437 U.S. at 232, 98 S. Ct. 2311. We have held that interference with open or prospective cases means hindering an agency's ability to control its investigation, enabling suspects to elude detection and intimidate witnesses, or prematurely revealing evidence or strategy. *Solar Sources, Inc.*, 142 F.3d at 1039 ATF has not affirmatively established any potential interference of this nature.

In the district court, ATF offered the testimony of its Chief of the Disclosure Division and the Assistant Director of Field Operation, both of whom attempted to prove the various ways in which the disclosure of this information might interfere with an investigation or other law enforcement proceeding. For example, they testified that if an individual pieced any withheld information together with what has already been disclosed, that individual might deduce that a particular investigation is underway. However, ATF concedes that it is not aware of a single instance in which information has been pieced together in this type of scenario. ATF's witnesses also testified that release of this data might threaten the safety of law enforcement agents, result in witness intimidation, or otherwise interfere with an ongoing investigation. Again, ATF's witnesses failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation. ATF's hypothetical scenarios do not convince us that disclosing the requested records puts the integrity of any possible enforcement proceedings at risk.

In addition, in all its affidavits, documents and testimony, ATF could not identify a single concrete law enforcement proceeding that could be endangered by the release of this information. ATF itself is not and does not plan to conduct any relevant investigations. It does not track the status of investigations surrounding traced weapons, and law enforcement agencies do not inform ATF of the status of any investigation surrounding any traced weapon. ATF has a policy of withholding some types of information for one year, and other types for five years in order to avoid any interference with investigations. This time line is based only on speculation that a given investigation will likely be closed after a certain number of years. This policy is not based on any concrete knowledge of whether an investigation is actually contemplated or ongoing. ATF has made simply no showing that enforcement proceedings are "pending or reasonably anticipated" beyond mere hypothetical scenarios.

Conversely, the City had several witnesses at the evidentiary hearing in the district court who testified that the release of this data was unlikely to compromise any police investigations. The City also argues that, as to the Trace Database records, any highly sensitive traces are coded and were not included in the City's FOIA requests. Moreover, the City noted that the multiple sales data reveals nothing about any potential or ongoing investigation, and anyone making a multiple purchase is most likely well-aware that the purchase information is immediately reported to ATF. Thus, it is highly improbable that any revelation of this information could endanger an investigation.

In sum, ATF's arguments that the premature release of this data might interfere with investigations,

threaten the safety of law enforcement officers, result in the intimidation of witnesses, or inform a criminal that law enforcement is on his trail are based solely on speculation. Nothing the agency submitted is based on an actual pending or reasonably anticipated enforcement proceeding. Under the ATF's suggested approach, all investigative records would be within the scope of Exemption 7(A) and the limitation that the records be reasonably "expected to interfere with law enforcement proceedings" would be meaningless. This result contradicts the congressional intent in fashioning FOIA and its exemptions. Exemption 7(A) was not intended to "endlessly protect material simply because it was in an investigatory file." *Robbins Tire*, 437 U.S. at 230, 98 S. Ct. 2311. The exemption requires a government agency to show by more than conclusory statements how the particular kinds of investigatory records would interfere with a pending enforcement proceeding. *Campbell v. Dept. of Health and Human Serv.*, 682 F.2d 256, 265-66 (D.C. Cir. 1982). ATF has failed to do so. Accordingly, we agree with the district court that the production of the requested data here would not "interfere with enforcement proceedings" within the meaning of Exemption 7(A) of FOIA.

B. Exemption 6

In addition, ATF argues that the individual names and addresses in the records are protected from disclosure under FOIA Exemption 6, 5 U.S.C. § 552(b)(6), because the disclosure of such records constitutes an invasion of personal privacy. Under Exemption 6, FOIA's disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted in-

vasion of personal privacy." 5 U.S.C. § 552(b)(6); *United States Dept. of State v. Washington Post Co.*, 456 U.S. 595, 598, 102 S. Ct. 1957, 72 L.Ed.2d 358 (1982). Thus, when the records are not personnel or medical files, the threshold test for Exemption 6 is whether the records at issue are "similar files." Only then is it necessary to consider whether the disclosure of the files would result in a clearly unwarranted invasion of privacy. The district court held that the exemption did not apply because the requested law enforcement files are not "similar files" since the information sought is not "information analogous to the type of sensitive information generally kept in a personnel or medical file, as would be protected by Exemption (6)." We agree.

ATF relies on *Washington Post Co.*, in which the United States Supreme Court stated that the "similar files" provision in Exemption 6 includes "information which applies to a particular individual." *Washington Post Co.*, 456 U.S. at 602, 102 S. Ct. 1957. In that case, the Washington Post filed a FOIA request with the Department of State for documents on whether certain Iranian nationals held valid United States passports. The Department of State refused to comply with the FOIA request on the grounds that Exemption 6 did not require disclosure. The agency submitted affidavits explaining that the subjects of the newspaper's request were prominent figures in Iran's Revolutionary Government, and disclosure of the documents would cause a real threat of physical harm to the men. The Supreme Court held that Exemption 6 protected this information from disclosure because it was within the scope of the "similar files" provision. In so doing, the Court noted that this exemption was intended to "cover detailed

Government records on an individual which can be identified as applying to that individual." *Id.* (internal citations omitted).

ATF argues that based on this Supreme Court precedent, the names and addresses in the instant case are shielded from FOIA's disclosure mandates. This reliance on *Washington Post Co.* is misplaced. Exemption 6 was enacted primarily "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information," and to "provide for the confidentiality of personal matters." *Id.* at 599-600, 102 S. Ct. 1957. The information sought in *Washington Post Co.* was highly personal and it was undisputed that the disclosure of the information would threaten the safety of the individuals. This is precisely the sensitive situation Congress intended Exemption 6 to protect.

On the contrary, in the instant case, the City seeks records pertaining to gun buyers and sellers. It is well-established that one does not possess any privacy interest in the purchase of a firearm. *See, e.g., Ctr. to Prevent Handgun Violence v. United States Dept. of Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997). Firearms manufacturers, dealers and purchasers are on notice that records of their transactions are not confidential and are subject to regulatory inspection. *United States v. Biswell*, 406 U.S. 311, 316, 92 S. Ct. 1593, 32 L.Ed.2d 87 (1972) (holding that when authorized by the Gun Control Act, a warrantless inspection of a gun dealer's storeroom does not violate the Fourth Amendment). Unlike the *Washington Post Co.* case, the names and addresses requested here are not of such a sensitive nature that their disclosure could harm or embarrass the individual. We therefore hold that the names and

addresses the City requested are not "personnel files and medical files and similar files" to which Exemption 6 applies.

C. Exemption 7(C)

Section 7(C) of FOIA exempts from disclosure "records or information compiled for law enforcement purposes . . . to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In order to establish that this exemption applies, a government agency must prove first that a privacy interest is implicated by the release of the records, and second, if there is such a privacy interest, that it is not outweighed by the public interest served by the release. *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762, 109 S. Ct. 1468, 103 L.Ed.2d 774 (1989). ATF argues that it has met this burden because the individual names and addresses at issue raise legitimate privacy concerns protected by Exemption 7(C) and there is no cognizable public interest in disclosing this information to the City. ATF's argument is unpersuasive.

Exemption 7(C) requires us to balance the public's broad right to information guaranteed under FOIA against the privacy rights that Congress intended to protect under the FOIA exemptions. *Marzen v. Dept. of Health and Human Serv.*, 825 F.2d 1148, 1154 (7th Cir. 1987). Using this framework, we first examine the privacy rights at issue. We agree with the district court that the release of the requested names and addresses does not raise any legitimate privacy concerns because the purchase of a firearm is not a private

transaction. *See, e.g., Ctr. to Prevent Handgun Violence*, 981 F. Supp. at 23-24. The Gun Control Act requires that a transaction for the sale of a firearm be recorded and every dealer is required to make business records available to investigation. Again, every purchaser of a firearm is on notice that their name and address must be reported to state and local authorities and ATF. *Id.; Biswell*, 406 U.S. at 316, 92 S. Ct. 1593. As a result, there can be no expectation of privacy in the requested names and addresses.

Even if we were to find a minimal privacy interest in this information, it is substantially outweighed by the public's interest in allowing the City to further its suit in the state court. To outweigh any privacy interest, there must be some public interest in disclosure that reflects FOIA's core purpose of "shed[ding] light on an agency's performance of its statutory duties." *Reporters Comm.*, 489 U.S. at 773, 109 S. Ct. 1468. In other words, the information sought must "contribute significantly to public understanding of the operations or activities of the government." *Id.* at 775, 109 S. Ct. 1468. Exemption 7(C) ensures that "the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the government be so disclosed." *Id.* at 774, 109 S. Ct. 1468 (emphasis omitted).

ATF correctly asserts that the City's particular interests in enforcing its gun ordinances do not weigh into the equation under Exemption 7(C). Nevertheless, the public's interest in disclosure is compelling. Inherent in the City's request for the records is the public's interest in ATF's performance of its statutory duties of tracking, investigating and prosecuting illegal gun trafficking, as well as determining whether stricter

regulation of firearms is necessary. ATF has acknowledged that its missions include analysis of firearm distribution and trafficking patterns, aiding local governments to enforce their own gun control laws and informing the public of the nature and extent of illegal gun trafficking. The effectiveness of ATF's performance impacts the City's interests in preventing illegal handgun trafficking and preserving the integrity of Chicago's gun control ordinances. There is a strong public policy in facilitating the analysis of national patterns of gun trafficking and enabling the City to enforce its criminal ordinances. Disclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of government agencies open to the sharp eye of public scrutiny.

When one balances the public interest in evaluating ATF's effectiveness in controlling gun trafficking and aiding the City in enforcing its gun laws against the non-existent or minimal privacy interest in having one's name and address associated with a gun trace or purchase, the scale tips in favor of disclosure. As a result, we hold that Exemption 7(C) does not protect any portion of the records from disclosure to the City.

Finally, ATF challenges the district court's alternative holding that even if the exemptions did permit the withholding of some sensitive information, this information was "reasonably segregable" from the remainder in the records and ATF was required to encrypt this sensitive information while producing all other information. Because we find that none of the purported exemptions apply to any portion of the records requested in this case, the district court's alternative holding on this

point is irrelevant and we need not address the issue of encrypting any portion of the records.

CONCLUSION

For the foregoing reasons, we AFFIRM the decision of the district court granting summary judgment in favor of the City.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-2167

CITY OF CHICAGO, PLAINTIFF-APPELLEE

v.

UNITED STATES DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANT-APPELLANT

Appeal from the United States District
Court for the Northern District
Of Illinois, Eastern Division

July 25, 2002

ORDER

Before: BAUER, ROVNER and WILLIAMS,
Circuit Judges.

The opinion issued by this court on April 25, 2002 is hereby amended. The following paragraph shall be inserted on the page eight of the opinion, after the first full paragraph:

We are not asking ATF to identify a *specific* instance in which the release of information has interfered with enforcement proceedings - we concede that this would be impossible, in light of the fact that this type of information has never before been released, and until it has, it cannot be misused. Moreover, *Robbins Tire* makes clear that a showing of specific instances of interferences is not required. 437 U.S. at 236. But this does not end our inquiry. ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*. Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records.

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the case by defendant-appellant, the *amicus curiae* brief in support of rehearing filed by The Fraternal Order of Police, the answer to the petition and the reply to the answer, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny rehearing. Accordingly, the petition for rehearing is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 00-3417

CITY OF CHICAGO, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANT

March 8, 2001

MEMORANDUM OPINION AND ORDER

Plaintiff City of Chicago initiated this action against Defendant United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms pursuant to the Freedom of Information Act, 5 U.S.C. § 552. The parties' cross motions for summary judgment as to Count I are before the Court. For the reasons articulated below, the Court grants summary judgment for Plaintiff and against Defendant.

I. BACKGROUND

On November 12, 1998, the City of Chicago (the City) filed a civil action against certain manufacturers,

distributers and dealers of firearms in the Circuit Court of Cook County, Illinois.[1]

In that suit the City alleges that the defendant gun manufacturers have created and maintained a public nuisance in the City of Chicago by intentionally marketing firearms to Chicago residents, and others likely to use or possess the weapons in Chicago, where essentially all firearms except long-barrel rifles and shotguns are illegal to possess. The City alleges that the gun manufacturers' conduct undermines the City's ability to enforce its guns control ordinances. The City's theory of liability in this lawsuit rests in part on the distribution practices of those gun manufacturers.

In an effort to gain information regarding nationwide firearm distribution patterns, the City turned to the United States Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, (ATF). ATF compiles national data regarding firearms and maintains those records in a database format. The City sought information from two of AFT's databases, the "Trace Database"[2] and the "Multiple Sales Database." Data in the Trace Database is complied when a law enforcement agency, such as the Chicago Police Department, contacts ATF and requests that a trace be conducted on a weapon which the law enforcement agency recovered in connection to a crime. In most circumstances, ATF uses the serial number on the gun to determine the gun's

[1] That case is styled *City of Chicago, et al.* v. *Beretta U.S.A. Corp. et al.*, 98 CH 15596.

[2] The City refers to this Database as the "Crime Gun Trace Database" and ATF refers to it as the "Trace Database Sub-Module." In the interest of simplicity the Court will refer to this database as the Trace Database.

manufacturer. ATF then contacts that manufacturer to determine to which distributor or dealer the weapon was sold. Generally, the tracing continues down the purchasing line until ATF discovers the name of the individual consumer who bought the gun. ATF then relays this information back to the initiating law enforcement agency, and inputs the data into the Trace Database. Data for the Multiple Sales Database is submitted to ATF by dealers. When an individual purchases more than one gun from the same dealer within a five day period, the dealer must provide ATF a "multiple purchase form." The information which ATF gathers regarding multiple sales is then inputted into the Multiple Sales Database.

In late 1998, the City submitted a Freedom of Information Act (FOIA) request to ATF, seeking information contained in both the Trace and Multiple Sales Databases. ATF denied the request, but promised to provide the requested information if the City formally withdrew its FOIA request and instead requested the information pursuant to the 1968 Gun Control Act. The City complied. However, ATF failed to provide the City with the promised information. The City communicated its information request to ATF on at least two subsequent occasions, and eventually, on March 3, 2000, again filed a formal FOIA request.

On March 8, 2000, ATF sent the City a "zip" disk containing information from its Trace and Multiple Sales Databases. The zip disk was not specifically complied in response to the City's FOIA request, but rather the disk contained information which ATF had complied beginning in 1998, as a uniform response to all FOIA requests. It is ATF's policy to respond to all FOIA requests with the zip disk, without consideration

as to the specifics of a particular request. Accompanying the zip disk was a letter from Special Agent Kathleen Kiernan, of ATF, informing the City that the zip disk was being provided pursuant to the 1968 Gun Control Act. Not surprisingly, the disk did not contain much of the specific information which the City sought in its March 3, 2000 FOIA request. Thus, having exhausted its administrative remedies with ATF, the City initiated this action June 7, 2000.

II. DISCUSSION

The Freedom of Information Act was enacted to, "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The unambiguous public policy preference embodied by FOIA is that government operations ought not to be shrouded in secrecy, thus obscuring both culpability and credibility. Moreover, exemptions to FOIA are to be narrowly construed, to further the policy of broad disclosure. *In re Wade*, 969 F.2d 214 (7th Cir. 1992). Thus, FOIA proscribes that except in certain specifically defined instances, government records will be disclosed. Where the government wishes to withhold properly requested records, the burden rests squarely with the government to demonstrate that the withheld information falls within one of FOIA's exemptions. *Solar Sources, Inc.* v. *United States*, 142 F.3d 1033 (7th Cir. 1998). In the instant case, ATF contends that all of the information it has withheld from the City falls within Exemption (6), Exemption (7)(A), or Exemption (7)(C), each of which are discussed below.

A. EXEMPTIONS (6) and (7)(C)

As an initial matter, the Court finds that none of the information requested falls within FOIA Exemption (6). Section 552(6) provides an exemption for, "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." The City of Chicago is not requesting personnel or medical files from ATF, nor is it seeking any analogous information regarding any particular individual. For example, as a category of information, the City requests the address where a traced gun was recovered. ATF claims this information falls within Exemption (6), essentially arguing that the location of a recovered gun is information which would typically be found in any individual's personnel or medical file. The Court disagrees. The location of a recovered weapon does not implicate a particular individual's privacy interest.[3] Perhaps more on point, ATF argues that categories of information which the City requests regarding the name and address of the purchasers and possessors of traced weapons, and multiple sale purchasers falls within Exemption (6). Again, the Court finds that an individual's name and address, where that individual is neither an employee or agent of the government agency, does not constitute information which is analogous to the type of sensitive

[3] Furthermore, even if a particular privacy interest were at stake, the dual public policy interests of facilitating the analysis of national patterns of gun trafficking, and enabling the City of Chicago to enforce its criminal ordinances, far outweighs any potential privacy interest which an individual has in avoiding being identified in connection with the recovery of a crime-related weapon.

information generally kept in a personnel or medical file, as would be protected by Exemption (6).

However, even if this information fell within the category of information protected by Exemption (6), the Court concludes that disclosure here would not constitute an "unwarranted invasion of personal privacy." Here, the privacy concern is implicated not by the publication of an individual's name and address, in which he clearly has a privacy interest, but rather by his identification in connection to a traced gun or the multiple purchases of guns. However, an individual's privacy interest in the secrecy of his gun purchase is very small. *See Center to Prevent Handgun Violence* v. *U.S. Dept. of Treasury*, 981 F. Supp. 20, at 23 (DDC, 1997). In contrast, the City of Chicago's interest in maintaining the integrity of its ordinances, as well as its interest in controlling gun trafficking into Chicago is very great. More compelling still is the general public interest in facilitating the analysis of gun trafficking patterns nationwide. Thus, whatever small privacy interest an individual may have in protecting his identity in connection with the purchase or possession of a weapon is greatly outweighed by the public interest in the disclosure of this information.

Further, ATF claims Exception under (7)(C) for all of the records for which it seeks exemption under (6). Section 552(7)(C) provides an exemption for law enforcement records where the disclosure of those records, "could reasonably by expected to constitute an unwarranted invasion of personal privacy." However, the Court balances these privacy concerns against public policy interests and similarly finds that the privacy interests of the individuals concerned are outweighed by the public policy interest in disclosure as discussed above.

B. EXEMPTION (7)(A)

The heart of ATF's claim to withhold information is Exemption (7)(A). Section 552(7)(A) provides an exemption for information "compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." ATF claims this exemption for every item it withheld, which totaled 45 categories of information in its Tracy Database and 33 categories of information in its Multiple Sales Database. In support of its assertion that the release of the data contained in these 78 categories of information could reasonably be expected to interfere with law enforcement proceedings, ATF offers the Declarations and testimony of Dorothy Chambers, Chief of the Disclosure Division at ATF, and David Benton, Assistant Director of Field Operations at ATF. The mainstay of both Chamber's and Benton's testimony is the contention that the disputed fields of information, when pieced together with other disclosed pieces of information, could potentially allow an individual to deduce that a particular investigation was underway.

However, although the same information is before ATF in full, ATF itself does not know when a particular investigation is underway. ATF does not track the status of investigations surrounding the weapons which it traces. ATF states that when a law enforcement agency requests a trace from ATF, the agency does not notify ATF whether an investigation is underway, nor does the agency later notify ATF that an investigation

has been concluded. Thus, ATF explains that it does not know when or whether an investigation is underway, absent notification from the law enforcement agency. That notwithstanding, ATF contends that criminally-minded individuals armed with the same information which ATF has, could determine when and whether an investigation was ongoing, without the law enforcement agency's notification.

Further, because ATF does not know when or whether an investigation is ongoing, ATF developed a policy of releasing information on a one year, and five year basis. ATF releases some information after one year, assuming that any investigation related to that information would be closed after a year. For other categories of information, ATF assumes investigations will be closed after five years. However, in both instances ATF is releasing the information based on blanket assumptions regarding potential investigations. Despite this imprecise system, and the magnitude of information at issue, ATF is not aware of a single instance in which an actual investigation was compromised as a result of the piecing together of information scenario which Chambers and Benton describe.

Moreover, Chambers and Benton testify that if the information which the City seeks were released, an individual could discover that a particular weapon had been traced, the name of the individual who purchased and possessed the weapon, and the enforcement agency which sought the trace. However, neither witness adequately explains specifically how that information would allow an individual to interfere with an enforcement proceeding. At most, the witnesses offer speculative views as to how an individual might deduce that a particular situation was being investigated, but neither

witness is able to tie these speculations to a concrete picture of how that information would allow an outsider to interfere with the investigation. Nor could either witness rule out the likelihood that a determined individual could make the same deductions regarding potential investigations absent the FOIA disclosure, particularly in light of the process by which ATF conducts its traces.

To overcome the presumption of disclosure, ATF must present more than the double hypothetical possibility that an enforcement proceeding may be underway, and that releasing the requested information may interfere with that enforcement proceeding. *See, e.g., Campbell* v. *HHS*, 682 F.2d 256 (7th Cir. 1982). Under that standard, any information gathered for law enforcement purposes could be withheld from disclosure under FOIA. Such a result would be clearly contrary to Congress's intent in fashioning Exception (7)(A). *See, Id.* Thus, the Court concludes that ATF has failed to demonstrate that the release of the requested information could reasonably be expected to interfere with an enforcement proceeding.

C. SEGREGABILITY

Furthermore, even were ATF able to adequately demonstrate that the disclosure which City seeks could reasonably be expected to interfere with an enforcement proceeding, FOIA requires that, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." Here, the Court finds that the identity of specific individuals and weapons in the database are reasonably segregable from the other information which the City

requests. ATF could easily "delete" the portion which it avers is sensitive, which here is limited to the identity of persons and weapons found in the database, while maintaining the integrity of the remainder of the requested information.

To illustrate this principle, the Court notes that the following sentence contains two separate parcels of information: John Doe purchased 12 guns which were recovered in Chicago in relation to a crime. First, there is the information that *a single individual* bought 12 guns which were subsequently recovered in Chicago. Second, there is the information that *John Doe* is the individual whose guns were recovered in Chicago. Only the second piece of information could reasonably be expected to interfere with an enforcement proceeding. However, in the instant action, the City seeks only the first parcel of information. In order to track the relationship between guns recovered in connection with crime, gun purchasers and gun manufacturers, the City needs to know that a particular individual purchased the recovered weapon, not the identity of that individual. Similarly, the City seeks to analyze the relationship between a particular weapon, and the events and manufacturer related to that weapon, but does not need the exact identifying serial number. In both instances a unique identifier code would serve to separate the sensitive information, from the information regarding trafficking patterns.

ATF argues that requiring the agency to encrypt identifying information constitutes the creation of new records. The Court finds otherwise. The City of Chicago is not asking ATF to track or input new information into its database system. Rather, the City is asking that ATF retrieve information already stored

within ATF's databases, in a redacted manner. Further, while ATF would like to retain a definition of deletion that is limited to marking out words with a black pen on a hard copy of text, such a definition is antiquated in this age of computer technology. Encryption is a modern form of computer deletion for redaction purposes. Encryption deletes sensitive information, such as exact identity, by obscuring it, while retaining useful information. In the example cited above, encryption effectively deletes parcel two of the information while retaining parcel one. Further, ATF's definition of deletion is not consistent with its own system of information distribution and management. When ATF wishes to redact a portion of sensitive information it does not assign someone to print out hard copies of that information and cross out sensitive words with a black pen. Rather, ATF stores all its data in databases and draws the information out of its databases for disclosure to the public by means of writing computer queries. ATF wrote specific redacting queries to develop the information it currently makes available on its FOIA zip disk. For example, ATF programed its database to compile only the last five of eight digits of its FFL numbers. Although ATF's database contains all eight digits, ATF wrote a query which redacted that number and then provided that information to the public on the zip disk. Similarly, in order to segregate the identity of any individual from other information surrounding the purchase and recovery of weapons, ATF would need only to write a query to recover the desired information in an encrypted format. The record before this Court reveals that writing such a query would take an ATF employee anywhere from a few minutes to a few hours. Further, once the information was encrypted, it could again be

stored on a zip disk and easily and cheaply provided to FOIA requesters. Thus, the burden on the agency is minuscule. Moreover, ATF is under an obligation pursuant to FOIA to provide the requested information in a redacted or encrypted format, where, as here, the information is stored in a database and such encryption is a reasonable and simple means of segregating sensitive information from non-sensitive information.

In sum, the Court finds that ATF has failed to satisfy its burden to demonstrate that the requested information was properly withheld under Exemption (6), (7)(A) or (7)(C), and the information must therefore be disclosed to the City under the Freedom of Information Act. Additionally, the Court finds that even if the information requested were to fall within one of the FOIA exceptions, the identifying information is entirely segregable from other valuable information, and ATF would have a duty to provide a redacted form of the information, as described above.[4]

ORDERED: Plaintiff's motion for summary judgment is granted. Defendant's motion for summary judgment is denied.

ENTERED:

/s/ GEORGE W. LINDBERG
GEORGE W. LINDBERG
United States District Judge

Dated: Mar. 6, 2001

[4] Plaintiff contends that Defendant has waived its right to claim exemptions under FOIA, by previously allowing other interest groups access to the requested information. The parties evidence a factual dispute surrounding this issue, and because the exemption issues are dispositive, the Court does not reach the question of waiver.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 00C3417
Judge Lindberg
Magistrate Judge Denlow

CITY OF CHICAGO, PLAINTIFF,

v.

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEFENDANT

DECLARATION OF DAVID L. BENTON, ASSISTANT DIRECTOR, FIELD OPERATIONS BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

1. I, David L. Benton, am the Assistant Director for Field Operations in the Bureau of Alcohol, Tobacco and Firearms ("ATF"), U.S. Department of the Treasury. I have served in this position since August 2000. As Assistant Director for Field Operations, I am the principal assistant to the Director in policy formulation and implementation of ATF's law enforcement efforts involving ATF special agents and inspectors assigned to ATF's twenty-three field divisions nationwide. I either personally review or get briefed daily on the criminal investigations and high-level industry-related issues pertaining to,

among other things, criminal firearms enforcement issues.

2. The statements made in this declaration are based on knowledge that I have acquired in the performance of my official duties. I have read and am familiar with the Complaint and other papers filed in this case.

3. The purpose of this declaration is to provide information about the Firearms Tracing System ("FTS") and to explain the bases for ATF's decision to provide Plaintiff most, but not all, of the data requested from the FTS under the Freedom of Information Act ("FOIA"). As explained herein, disclosure of the entire FTS could reasonably be expected to interfere with law enforcement proceedings and privacy interests.

4. I have been a Special Agent with ATF since 1975. During my ATF career, I have served in various managerial and supervisory positions including Resident Agent in Charge in Wichita, Kansas, Assistant Special Agent in Charge in Kansas City, Missouri, and Special Agent in Charge in Chicago, Illinois. I have also held several positions in ATF headquarters, most recently serving two years as Assistant Director for Liaison and Public Information.

5. As Assistant Director for Liaison and Public Information, I was responsible for all disclosures made by ATF under the FOIA and served as the deciding official on numerous FOIA requests for data from the FTS database.

6. As a Special Agent and supervisor, I have had extensive experience in the area of firearms tracing throughout my career. I initiated numerous firearms traces as a criminal investigator. This process involved examining voluminous firearms records of Federal Firearms Licensees ("FFLs").

7. I have also supervised a wide range of firearms enforcement activities including investigations of firearms traffickers and violent criminal organizations. A significant investigative tool in these investigations has been the tracing of firearms, which assists the investigators in locating the "sources" of firearms. Firearms tracing is a critical element of ATF's law enforcement mission, as it provides valuable investigative and strategic information about illegal sources of firearms. For example, trace information can reveal that a purchaser is repeatedly buying firearms from an FFL or that guns recovered in crimes originate frequently from a particular FFL.

8. I served as Deputy Associate Director for Law Enforcement from October 1993 to November 1995. In this position, I supervised major firearms tracing/trafficking projects in Detroit, Los Angeles, Baltimore, and Chicago. These projects served as the impetus for the formulation of ATF's National Tracing Center's ("NTC") Crime Gun Analysis Branch in West Virginia.

ATF's Law Enforcement Mission

9. The Secretary of the Treasury has statutory responsibility to enforce Federal firearms laws.

The Secretary delegated these responsibilities to ATF by Treasury Order No. 120-01 (June 1972) (formerly T.D. Order No. 221, 37 Fed. Reg. 11,696).

10. ATF is a criminal and regulatory enforcement agency within the Department of the Treasury and is responsible for, among other things, enforcing Federal firearms laws including the Gun Control Act of 1968 ("GCA"), 18 U.S.C. §§ 921-930 (2000) (originally enacted as Act of Oct. 22, 1968, Pub. L. No. 90-618, § 1, 82 Stat. 1213). The GCA established a licensing system for persons engaged in manufacturing, importing, dealing, and collecting firearms (*i.e.*, FFLs). ATF enforces the licensing provisions of the GCA, which, among other things, regulates the interstate movement of firearms.

11. The GCA requires FFLs to keep records of firearms acquisition and disposition, maintain that information at their business premises, and make these records available to ATF for search and inspection under certain specified circumstances. The GCA requires FFLs to respond within 24 hours after receiving a request for records as may be required to determine the disposition of one or more firearms "*in the course of a bona fide criminal investigation.*" 18 U.S.C. § 923(g)(7) (emphasis added). NTC personnel enter the information provided pursuant to a trace request in the Trace Database Sub-Module of the FTS, which collects and tracks data on traces of firearms suspected of being involved in a crime. Utilizing these GCA records, ATF provides firearms tracing services in support of

criminal investigations to Federal, State, local, and international law enforcement agencies.

12. The GCA also requires FFLs to prepare a report of a multiple sale whenever they sell or otherwise dispose of two or more pistols or revolvers (handguns) to an unlicensed person within any five consecutive business days. *See* 18 U.S.C. § 923(g)(3)(A). These multiple sales reports must be forwarded to the NTC, where they are entered into the Multiple Sales Database Sub-Module, as well as to the law enforcement agency for the jurisdiction in which the sale or disposition took place not later than the close of business on the day that the transaction occurs. Multiple sales may indicate illegal trafficking in firearms, and the multiple sales reports are often the starting points for investigations of illegal gun trafficking.

Firearms Tracing

13. To carry out its firearms tracing functions, ATF maintains the FTS, which is a law enforcement information database, at the NTC. The NTC provides ATF field agents and other law enforcement agencies with "trace data" as quickly as possible as well as investigative leads obtained from the traced firearm.

14. "Tracing" a firearm is the systematic tracking of the history of a firearm from the manufacturer or importer through wholesalers to the retail FFL(s) and ultimately to the first retail purchaser. A firearm trace begins when the NTC receives a request from the Federal, State, local, or international law enforcement agency that

recovers a firearm. The firearm typically is recovered at the scene of the crime or from the possession of a suspect, felon, or other prohibited person.

15. To conduct a trace, the requesting agency must provide the NTC with the manufacturer, weapon type, caliber, and the serial number of the firearm recovered in connection with a crime. In a typical case, after receiving a trace request, NTC personnel contact the manufacturer or importer to determine when and to whom the firearm in question was sold. When the NTC contacts an FFL requesting information, ATF informs the FFL only about the firearm involved in the trace; the FFL is not informed of any circumstances relating to the crime or which law enforcement agency recovered the firearm.

16. In most instances, the manufacturer or importer has sold the firearm to an FFL wholesaler. NTC personnel then contact the wholesaler to determine when and to whom the firearm in question was sold, usually to an FFL retailer. The tracing process continues as long as records allow and is considered successful when ATF can identify the first retail purchaser (a non-FFL) from an FFL. ATF's tracing process generally stops at the first retail purchase because any subsequent disposition of the firearm by a non-FFL is not subject to GCA record-keeping or reporting requirements.

17. The "trace data" are maintained in the Trace Database Sub-Module of the FTS and include the 8-digit identification number of the FFLs involved in the sale or transfer of the firearm along

with any information regarding the retail purchaser of the firearm. Law enforcement agencies, including ATF, may use the "trace data" to link a suspect to a firearm-related criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime.

18. The NTC forwards the firearms tracing results directly to the requesting law enforcement agency. Approximately one-half of the requests in any given year are successfully traced to the retail purchaser of the firearm.

Disclosure Concerns Under the FOIA

19. Requests from over 17,000 law enforcement agencies other than ATF in the United States and abroad comprise the bulk of firearms traces conducted by ATF. The remainder of the traces are conducted pursuant to ATF investigations. As of November 9, 2000, the FTS contains the results of 1,261,593 traces of which 920,655 originated from state and local law enforcement. In fiscal year 1999, ATF processed approximately 209,000 requests for firearm traces, the vast majority of which came from other law enforcement agencies.

20. Federal, State, local, and international law enforcement agencies are not required to advise ATF of the status of their investigations. The NTC provides the service of tracing firearms but does not track the status of these investigations. Thus, unless ATF's agents are involved directly in a case, ATF is not informed as to whether the

requesting agency has an open criminal case that could be jeopardized by disclosing information pertaining to the firearm trace conducted by ATF. Nor is ATF informed when the requesting agency's criminal investigation has been concluded. However, there is no doubt that many of the over 1.2 million trace results in the FTS relate to open investigations. For this reason, ATF must be extremely cautious in disclosing law enforcement data from the FTS to members of the public under the FOIA.

21. Included among the Federal agencies that submit trace requests are United States government intelligence agencies that submit requests regarding the movement of arms abroad. These requests are very sensitive and are handled in strictest confidence. Because firearms tracing is voluntary and depends in significant part on the requesting agency's expectation of ATF nondisclosure policy to maintain confidentiality, it is quite apparent that the release of "trace data" could be expected not only to compromise investigative and intelligence operations, but also to undermine the confidence in the NTC and the entire tracing process.

22. Because the data are not "reasonably segregable" in an open investigation-specific manner, ATF FOIA policy with respect to the FTS data at issue is to provide as much data as possible under the FOIA, but to withhold those data that would, when combined with information that ATF makes available to the public under the FOIA, reveal the results of ATF's trace before the law enforcement agency has had a reasonable opportunity to solve the crime that may be related to the traced firearm. Thus, through its balanced disclosure policy, ATF aims to prevent parties other than the jurisdiction that submitted the trace request to "connect the dots" or have all of the information necessary to attempt to trace firearms recovered in a crime while the investigation may be open.

23. The following example illustrates the importance of ATF's policy. ATF successfully interdicted an international firearms trafficking conspiracy in which several individuals were utilizing several different FFLs in South Florida to smuggle firearms into a Middle Eastern country. After obtaining the cooperation of two defendants, ATF discovered that this smuggling ring was also part of a much larger firearms trafficking conspiracy being investigated in Ohio. If parties other than the jurisdiction that submitted the trace requests to ATF had unredacted trace information, as sought by Plaintiff in this case, then they could have contacted the FFLs or purchasers in question in an effort to obtain information about the purchaser(s) of the traced firearms, who were being investigated. Either of these results could have compromised a very sensitive international investigation that was later joined by Interpol.

24. Two recent ATF initiatives further demonstrate the importance of crime gun tracing with respect to illegal trafficking. Online LEAD is a computer-based software program that performs automated analysis by linking the identical information or data from numerous records such

as a firearm trace and a multiple sale of firearms. For example, when the name of the purchaser is linked to multiple purchases of firearms recorded in multiple sales records, this could indicate that firearms being purchased in multiple sales are being subsequently diverted for illegal use. The linking of the same purchaser to several firearm traces would also be an indicator of illegal conduct, as would multiple sales of non-collectable firearms or firearms with a high incidence of use in crime.

25. Online LEAD provides investigative leads to ATF Special Agents and police officers working with ATF regarding illegal firearm traffickers by analysis of FTS data. Online LEAD provides ATF agents on ATF computers with a daily extract from the FTS that can be used to find repeat sellers and buyers of crime guns based on some of the data withheld under the FOIA such as the identity of the firearm's possessor and his associates. Armed with this information from the FTS, ATF agents at field offices throughout the country can work to identify possible illegal firearms trafficking, independent of any particular trace request.

26. Similarly, the Youth Crime Gun Interdiction Initiative ("YCGII"), which was developed in response to increased firearms crime involving America's youth, seeks to determine the illegal sources of guns for youths by analyzing trace data to detect patterns in the local supply of crime guns. Participating law enforcement agencies in the initiative committed to having all crime guns recovered in their jurisdictions

traced through the NTC. YCGII is ATF's primary investigative technique to identify the sources of illegal firearms trafficking to juveniles.

27. Assume, for example, that the Baltimore Board of Education finds a significant number of firearms on school property and requests that they be traced. ATF agents in pursuit of a YGCII investigation develop a confidential informant who identifies the source of the firearms as a particular FFL. As a result, ATF requests that the FFL not be contacted by the NTC as part of a firearm trace. Investigation reveals that the FFL is paying people off the street to fill out the GCA-required firearms acquisition and disposition records. The FFL then delivers the guns to Baltimore for sale. If the FFL were able to determine from publicly available ATF data that his weapons are being traced prior to the disclosure of such information per ATF policy, then he could avoid detection by altering or moving illegal operations prior to completion of the investigation and, thus, contravene ATF's goal of protecting the integrity of law enforcement investigations. ATF can identify an FFL involved in criminal activity through the use of multiple sales records without the need to alert the FFL as part of a firearm trace.

28. Because of these concerns, it is a standard operational security practice in the law enforcement community that shared investigative information concerning a recent crime should not be disclosed without the specific authorization of the original investigating agency where disclosure

could compromise an investigation or reveal the identities of law enforcement personnel or third parties. The premature release of all of the information sufficient to trace firearms relating to an open investigation may well compromise a criminal case in that evidence may be tampered with or the safety of investigators, informants and witnesses may be jeopardized if a potential defendant discovers their involvement in an investigation. With over 200,000 traces per year for approximately 17,000 law enforcement agencies in the United States and abroad, it would be impossible for ATF to identify the open cases and the information whose disclosure would compromise a criminal investigation and to segregate the open investigations from the closed investigations. This task would involve maintaining regular contact with each requesting agency to determine this information, which ATF does not need for enforcement purposes.

29. ATF's concerns regarding the release of the information sought by Plaintiff are shared by the Fraternal Order of Police ("FOP"), which has more than 290,000 members and the Law Enforcement Steering Committee ("LESC"), an entity representing over 500,000 law enforcement officers and police practitioners in such organizations as the National Association of Police Organizations and the Major Cities Chiefs. The FOP's and LESC's member agencies have long utilized ATF's firearms tracing, and their participation in ATF's firearms tracing efforts is based on the trust and understanding that ATF

will not disclose the information in question to anyone other than the requesting agency if there is any chance of compromising an investigation or disclosing the names of enforcement personnel or third parties. The FOP and LESC have expressed particular concern to ATF about the premature disclosure of data that would link a specific firearm being traced to the particular FFLs, the individual purchaser, the possessor and any associates, and the location where the crime occurred because it could jeopardize their members' cases and the continued value of the NTC to them. Recent letters from the FOP and LESC to ATF are attached hereto as Attachment 1.

Data Withheld In Response to Plaintiff's FOIA Requests

30. As described in paragraph 11 of the Declaration of ATF Disclosure Division Chief Dorothy A. Chambers, the complaint that is the subject of this litigation concerns law enforcement data from two sub-modules—the Trace Database Sub-Module and the Multiple Sales Database Sub-Module—of the FTS. Pursuant to the FOIA, ATF discloses all but a small portion of the data contained in these two sub-modules. The small amount of withheld data is justified pursuant to FOIA Exemptions 6, 7(A), and 7(C), and is reflected in the chart concerning the data at issue in Attachment 2 to Ms. Chambers's Declaration.

31. Exemption 7(A) entitles ATF to withhold as exempt from public disclosure information that is

"compiled for law enforcement purposes" to the extent that "the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings. . . ." 5 U.S.C. § 522(b)(7)(A). Exemption 7(C) authorizes the withholding of law enforcement records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." *Id.* § 552(b)(7)(C). Under Exemption 6, ATF may also withhold information about individuals in "personnel and medical and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552(b)(6). ATF must strike a reasonable balance between open disclosure and the protection of legitimate law enforcement and privacy interests.

32. The Trace Database Sub-Module contains approximately 300 data elements. The data elements in the Trace Database Sub-Module can be grouped into the following six general categories: (i) information about the law enforcement agency requesting the trace, such as the agency's name, address, case number, and investigative notes provided by the agency; (ii) information provided by the requesting agency regarding its recovery of the firearm, such as the date and location where the traced firearm was taken into custody by the requesting agency; (iii) information about purchasers of the traced firearm; (iv) information about possessors of the traced firearm and any associates (*i.e.*, persons with the possessor of the firearm when the

firearm comes into police custody), such as their names and addresses, driver's license information and social security numbers, and any related vehicle information; (v) information identifying each FFL that has sold the traced firearm; and (vi) information about the traced firearm such as the manufacturer, importer, model, weapon type, caliber and serial number.

33. The Multiple Sales Database Sub-Module contains a subset of data elements that are also in the Trace Database Sub-Module. The data elements include purchaser name and identifying information (*e.g.*, address and date of birth), weapons information (*e.g.*, manufacturer, weapon type, serial number, and caliber), and FFL identifying information, (*e.g.*, name and address). ATF uses the Multiple Sales Database Sub-Module to develop leads regarding illegal firearm trafficking. That is, ATF analyzes multiple sales data to develop investigative leads for those persons who engage in business as unlicensed firearms dealers or who transport or sell firearms illegally in interstate commerce.

<u>ATF's Withholdings Under FOIA Exemption 7(A) For Data From the Trace Database Sub-Module</u>

34. The Trace Database Sub-Module data at issue in this case (*i.e.*, the data identified in Section III of Plaintiff's Bill of Particulars) can be organized into the following six categories: Requester Information Data, Weapon Data, Recovery Location Data, Possessor and Associates Data, FFL Identification Data, and Purchaser Identification Data.

35. ATF withholds all data in the Trace Database Sub-Module for a period of one year under Exemption 7(A) because firearms traces may take many weeks or months to complete, and the delay allows law enforcement personnel sufficient time to complete the trace process of identifying purchasers and possessors of the firearm after it leaves the FFL's distribution chain. The one-year withholding period for all trace data also protects against the possibility of interference with a recently-opened investigation. After one year, ATF releases data that the agency determines is not likely to cause such interference.

36. For example, a law enforcement investigation could be compromised if the news media or anyone other than the investigating law enforcement agency prematurely obtained the trace data. They could then attempt to trace the firearm(s) themselves and contact potential defendants and witnesses to the crime, thus compromising the investigation by getting to the suspect or witnesses before the law enforcement agents do. A situation similar to this happened after the Columbine High School tragedy when the news media interviewed persons involved in selling the firearms used in the crime before law enforcement had a chance to interview them. Although in this example, the information was disclosed by local law enforcement, it illustrates how premature disclosure of trace information can interfere with law enforcement investigations.

37. ATF has produced to Plaintiff all existing requested data from the Trace Database Sub-Module through December 31, 1998,[1] with the exception of data from nine of the 300-plus data elements in this Sub-Module, which are withheld for five years under Exemption 7(A), and individuals' name and address data, which are withheld indefinitely for privacy reasons under Exemptions 6 and 7(C).

38. ATF withholds data from the nine data elements[2] for five years under Exemption 7(A) because their release, combined with the other FTS data that ATF currently releases, would enable members of the general public to trace firearms used in crimes and interfere with law enforcement investigations. ATF is willing to release this information after five years because, in ATF's experience, trace information tends to become "stale" and less important to law enforcement agencies after five years. This five-year term is also consistent with the statute of limitations for violations of the GCA, 18 U.S.C. § 3282, which sufficiently reduces the law enforcement interest in the data after that time to tip the balance under the FOIA in favor of

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[1] Data through December 31, 1999 will be released to the public as of January 1, 2001.

[2] Requester Information Data (ORI Code, Agency Name, Agency City, and Agency Zip Code); Weapon Data (Serial Number and Importer Name); the FFL Identification Data (FFL Number and Invalid Dealer Number), and Purchaser Identification Data (Purchase Date only; the other data elements in this category are withheld indefinitely under Exemptions 6 and 7(C), as explained below).

disclosure. Thus, ATF has determined that protection of the data for five years strikes the most appropriate balance between public disclosure of as much information as possible and the protection of law enforcement efforts. The application of Exemption 7(A) for each category of data withheld is explained below.

Requester Information Data

39. ATF withholds the Requester Information Data[3] under Exemption 7(A) because premature disclosure of this information would reveal which law enforcement agency has requested a firearms trace. The "requester" refers to the law enforcement agency that has requested tracing assistance from ATF pursuant to the GCA. When combined with other data contained in the Trace Database Sub-Module, public disclosure of the Requester Information Data could reveal prematurely the existence of a law enforcement investigation by the investigating agency. Premature public disclosure of the ORI Code, which, like the Agency Name, identifies a non-ATF law enforcement agency that requested the trace, would inform the public that such agency was conducting an investigation into a crime involving a firearm already publicly disclosed under the FOIA by make, model, and serial number. For example, assume a local police officer is working undercover purchasing firearms from an associate of an FFL in Ohio. He is purchasing

[3] Requester Information Data at issue consists of four data elements: ORI Code, Agency Name, Agency City, and Agency Zip Code. See Pl.'s Bill Req. 1-3.

these legal firearms from the FFL with the understanding that he will be selling the firearms illegally on the streets of Detroit. If the FFL knows that his local police department is tracing the firearms, the investigation could be compromised and the police officer's safety could be in jeopardy because the criminals would make every effort to identify the law enforcement agency and officers involved in the investigation. Withholding the ORI Code (and the rest of the Requester Information Data) allows the investigating agency the time to utilize the information provided on the trace report (to conduct interviews of the FFL, suspects, develop additional investigative leads, etc.) without fear of having its law enforcement investigation jeopardized by an outside source. Again, the jeopardy to law enforcement derives from the disclosure of the investigating agency in the context of the information already made public under the FOIA by ATF. For similar reasons, ATF withholds the Agency City and Zip Code for five years, as it would be fairly easy for a member of the public to discern the requesting agency given this level of specificity, especially in lightly populated jurisdictions.

Weapon Data

40. ATF withholds the Weapon Data[4] under Exemption 7(A) because these data can tip off non-law enforcement personnel as to important aspects of

[4] Weapon Data at issue consists of two data elements: Serial Number and Importer Name. See Pl.'s Bill Req. 9-10.

an active investigation concerning a firearm used in a crime.

41. The serial number of traced firearms is withheld for one year for the reasons described in ¶ 35. The only exception is that ATF withholds serial numbers of traced firearms for five years if the firearm is involved in a multiple sale. Only 1.3% of the completed traces in the Trace Database Sub-Module concern a firearm purchased as part of a multiple sale.

42. The serial number of the firearm is one of the most critical pieces of information relative to firearms traces. Greater protection is necessary in the context of multiple sales due to ATF's disclosure of the retail FFL's identity as well as the serial numbers of handguns involved in multiple sales in the Multiple Sales Database Sub-Module under the FOIA. If the serial numbers of firearms included in both the Trace Database Sub-Module and the Multiple Sales Database Sub-Module were released prior to five years after the date of the trace, then non-law enforcement personnel would have enough information to identify FFLs involved in a firearms trace before the expiration of the five-year period established by ATF. Prior to five years, ATF releases from the Trace Database Sub-Module only three digits of the eight-digit number that ATF uses to identify an FFL. *See infra* ¶ 49. However, all eight digits are released from the Multiple Sales Database Sub-Module, albeit without connection to any particular trace investigation. Thus, parties other than those directly involved in the investigation at issue

could link the firearm from a trace to a multiple sale record and identify the FFL that made the final retail sale. Specifically, non-law enforcement personnel would have both the serial numbers of traced firearms and the FFL's eight-digit number from whom the traced firearms were purchased.

43. In addition, premature disclosure of the serial numbers, in conjunction with other released data, would make it more difficult for law enforcement agents to discern firearms trafficking patterns because traffickers could ascertain whether their purchases are being examined by law enforcement personnel. That is, traffickers could shift their purchase patterns and firearms sources to avoid detection. For example, a multiple purchaser of firearms could cease making multiple purchases, thereby making it more difficult to identify the pattern of a firearms trafficker. This can be seen in States that have enacted laws allowing only one handgun purchase per month. Trends indicate that ten straw purchasers now purchase one firearm each whereas one straw purchaser used to purchase ten firearms in a single transaction.

44. The Importer Name is released after five years based on the same rationale. If ATF were to disclose the importer name, members of the public would know which FFL imported the firearm used in a crime. Given that information, the importer could be approached by private investigators, members of the media, possible suspects, witnesses, or others whose actions could interfere with an active law enforcement

investigation. Again, the jeopardy to law enforcement investigations results not from release of this specific data, but rather the release of this data in conjunction with all of the other date released by ATF. Such interference could lead to alerting suspects prematurely or endangering witnesses and informants. Moreover, an importer can also make direct retail sales of firearms. As such, they can be the closest link to the first retail purchaser, thus raising the potential to compromise an investigation if they are prematurely contacted by the public.

Recovery Location Data

45. The Recovery Location Data[5] are withheld under Exemption 7(A) because they reveal the physical location of a firearm involved in a crime. Recovery location is the street address or vehicle identity where the traced firearm was found by law enforcement or when there is no address (for example, where a criminal throws the firearm into a river), the recovery location is the nearest street address. As such, that location may be part of the crime scene or may concern the home or business address of the victim, suspect, witness, or an acquaintance thereof. Public disclosure of this information could lead to members of the public visiting the premises, thus potentially altering or tampering

[5] Recovery Location Data at issue consists of seven data elements: Route Number, Apartment Number, Street Number, Street Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 16-22.

with physical evidence, or contacting individuals who work or live at the recovery location, which could result in, among other things, notice to the suspect of an investigation, the intimidation of witnesses, disclosure by those individuals of information that could assist the perpetrator's flight, or the lack of cooperation with the investigating authorities. For example, in a case where someone kills four people at a local fast food restaurant and dumps the gun down the sewer on the next block, disclosure of the recovery location could tip the suspect that the police have found the weapon, and thus could be closing in on him prior to the time that the police are ready to arrest him. The place where a criminal attempts to hide the crime gun is often known only to the potential defendant. Disclosure of law enforcement's recovery of the firearm with the exact serial number from the very location where the perpetrator left it would clearly tip off the criminal that law enforcement is on his trail.

46. ATF does not claim Exemption 7(A) for the Recovery Location Data after five years. However, ATF continues to withhold all of these data to protect the privacy interests of the individuals who live or work on the premises, as discussed further below.

Possessor and Associates Data

The Possessor and Associates Data[6] are withheld under Exemption 7(A) because they reveal the

[6] Possessor and Associates Data at issue consists of 11 data elements: Last Name, Middle Name, First Name, Name Suffix, Route Number, Apartment Number, Street Number, Street

names and addresses of individuals who possessed a firearm or were directly associated with the possessor when the firearm involved in a crime was recovered. These people may be witnesses, suspects, or acquaintances of suspects, and thus, their public identification with a crime may cause them to flee the jurisdiction, inform the perpetrator of the investigation and the trace, or manufacture an alibi for any possible involvement with the crime. To the extent that an associate became a witness or informant, the routine public disclosure of his name and address could put him in physical danger or, at minimum, discourage witness or informant cooperation in future investigations.

48. ATF does not claim Exemption 7(A) for the Possessor and Associates Data after five years but continues to withhold all of these data to protect the privacy interests of the individuals whose names and addresses are contained in these data elements, as discussed further below.

FFL Identification Data

49. The FFL Identification Data[7] are withheld for five years under Exemption 7(A) because they reveal the FFL(s) who sold the firearm involved in a crime. Within five years of a trace request, ATF releases the first three digits in the FFL number, which identify the State and region of

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Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 23-33.

[7] FFL Identification Data at issue consists of three data elements: FFL Number and Invalid Dealer Number. See Pl.'s Bill Req. 34-35.

the FFL(s) involved in a trace. Disclosure of the entire FFL Numbers prior to that time would create a significant risk that the disclosure of this information could prematurely reveal the existence of an investigation, which could compromise that investigation. As noted elsewhere herein, providing the specific identity of the FFL in conjunction with other data released by ATF, such as serial numbers of traced firearms, would allow third parties not involved in the specific law enforcement investigation in question to "connect the dots" and potentially compromise such an investigation, especially where the FFL is suspected of wrongdoing (*e.g.*, illegal trafficking).

50. For example, an FFL owner and FFL employees may be witnesses, suspects, or accomplices to the crime committed with that firearm. If ATF were to disclose the entire eight-digit FFL number, members of the public would know which FFL sold the firearm in question, which is already identified to the public by the serial number. Given that information, the FFL owner and employees could be approached by private investigators, members of the media, possible suspects, witnesses, or others whose actions could interfere intentionally or unintentionally with an active law enforcement investigation by, among other things, tampering with these individuals' potential testimony.

51. Another example is an ATF case where firearms were being purchased in Georgia and transported to New York. Through firearm tracing over a period of time, ATF agents in New York

were able to identify an FFL who was selling guns in Georgia that were being recovered in New York. ATF was able to enlist the assistance of the retail FFL in Georgia and set up surveillance from the time of sale through the trafficking of the firearms into New York. If the identity of the FFL who was illegally selling the firearms had been released prematurely, that is, before ATF secured his cooperation, in connection with the disclosure of the serial numbers of the firearms in question and other released information, the investigation could have been compromised. That is, the FFL would have been on notice that the specific firearms he knows were illegally diverted have been recovered by law enforcement in another State. Obviously, the FFL would begin taking actions to thwart the ongoing investigation by refusing to sell to the violators and causing the traffickers to go elsewhere or warning the violators prior to contact by the ATF agents.[8] Until the investigation was completed, GCA violations could not be established conclusively. In this case, surveillance was critical to proving GCA violations. Cases like this can take two years or longer to develop as firearms are recovered that indicate a pattern of possible violations. The follow-up investigation can also take several years to complete.

52. In another ATF case, a five-month undercover investigation of a corrupt FFL resulted in the execution of a Federal search warrant. After the

[8] In such cases, ATF would not contact the target FFL as part of the trace.

execution of the search warrant, the FFL agreed to cooperate and functioned as a "storefront" operation for firearms traffickers for an additional nine months. Premature release of the FFL information and additional information already disclosed by ATF under the FOIA would be sufficient to link the traced firearms to the FFL. This knowledge could be used to compromise the investigation and potentially endanger a cooperating witness and law enforcement personnel. Violators could monitor the trace information to see if law enforcement is investigating any of the trafficked firearms. If the stolen firearms were sold to an FFL acting as a "fence" and the firearms were traced, then the violator could determine if the firearms had gained the attention of a law enforcement agency.

53. The Invalid Dealer Number is a number assigned to Federal, State, local, military, and foreign governments who are not required under the GCA to obtain a Federal firearms license to sell firearms. When a gun that has been purchased by one of these agencies is subsequently recovered in a crime (whether the gun was stolen, lost, or legally traded-in to obtain revenue for newer weapons) the agency information is entered into the Trace Database Sub-Module under the heading "invalid FFL." These data are protected under Exemption 7(A) to allow the investigating agency to determine the value of the information without concern that their investigation would be jeopardized by an outside source. For example, potential suspects could be

members of the "invalid FFL" who are illegally selling the firearms in question.

Purchaser Identification Data

54. The Purchaser Identification Data[9] are withheld under Exemption 7(A) because they reveal the names and addresses of individuals who purchased a firearm involved in a crime. Like a possessor or associate, a purchaser may be a suspect, accomplice, witness to the crime, or an acquaintance thereof; thus, the purchaser's public identification with a crime may cause him to flee the jurisdiction, inform the perpetrator of the investigation and the trace, or manufacture an alibi for any possible involvement with the crime. Any of these outcomes could frustrate the criminal investigation.[10]

55. The purchase date of the firearm is withheld because, in combination with the data released under the FOIA such as make, model, and serial number of the traced firearm(s), the date could easily identify the FFL who sold a firearm. The

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[9] Purchaser Identification Data at issue consists of 12 data elements: Purchase Date, Last Name, Middle Name, First Name, Name Suffix, Route Number, Apartment Number, Street Number, Street Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 39-50.

[10] As a matter of policy, ATF deletes the name data elements (i.e., Last Name, Middle Name, First Name, and Name Suffix) after eight years. Thus, the Trace Database Sub-Module contains no name data for purchasers of firearms involved in a trace before January 1, 1992. This policy is consistent with Congressional concerns about the privacy rights of law-abiding firearms owners, discussed further below.

FFL may be a witness or a subject of an investigation on the sale, transfer, or use of the firearm in a crime. A corrupt FFL would have the ability to identify by serial number firearms he or she had diverted and therefore would know with certainty that the firearms had been recovered and that he or she is being investigated. Other interested parties could identify the FFL from the date and description of the firearm and possibly interfere in the investigative process.

56. For example, an FFL may be reporting firearms as stolen when, in reality, he is trafficking the firearms "off of the books." ATF could be investigating these thefts, without immediate suspicion of the FFL. The firearms would be traced to see if they were turning up in crimes. If the trace information and purchase dates were released, the FFL could become aware that the firearms are being traced and that he is being investigated and, therefore, take steps to avoid detection.

57. ATF does not claim Exemption 7(A) for the Purchaser Identification Data after five years but continues to withhold all of these data (except for Purchase Date) to protect the privacy interests of the individuals whose names and addresses are contained in these data elements, as discussed further below

ATF's Withholdings Under FOIA Exemption 7(A) For Data From the Multiple Sales Database Sub-Module

58. ATF withholds all existing data requested by Plaintiffs from the Multiple Sales Database Sub-Module under Exemption 7(A) for a period of two years.[11] ATF has produced to Plaintiff all national data in the Multiple Sales Database Sub-Module through June 30, 1998, except for Purchaser Involved In Multiple Sales Data, which are withheld to protect the purchasers' privacy interests, as discussed further below.

59. ATF withholds for two years all of the multiple sales data requested by Plaintiff because disclosure of the data of a reported multiple sale within that time would compromise ATF's ability to formulate strategies and to discern and act upon possible patterns and trends of firearms trafficking. In ATF's experience, a firearm recovered in connection with a crime within two years of its sale is a strong indicator that the firearm was illegally diverted (*i.e.*, purchased with the intent to commit a crime). Where that sale is found to be part of a multiple sale, such evidence carries even greater weight and may suggest to ATF that the purchase was related to illegal firearms trafficking involving additional weapons and purchasers.

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[11] As explained in ¶ 12, the Multiple Sales Database Sub-Module contains data derived from reports that FFLs must complete under the GCA whenever they sell or otherwise dispose of at least two handguns to any unlicensed person within any five consecutive business days. See 18 U.S.C. § 923(g)(3)(A).

60. A two-year cushion for disclosure of all multiple sales information provides ATF with important protection against public contacts with FFLs or purchasers of multiple sales that could hinder any trafficking-related investigations. Two years also gives ATF an opportunity to study multiple sales patterns among FFLs and purchasers before the general public can, thus making it more difficult for traffickers to study and, therefore, change, their firearms transactions patterns. Thus, in balancing law enforcement concerns against disclosure interests, ATF has decided that, absent Exemption 7(C) privacy concerns, as expressed below, all multiple sales information would be released under FOIA after two years.[12]

61. An ATF case illustrates the necessity of the two-year policy on multiple sales data. ATF agents examining multiple sales reports became aware of a group that was trafficking drugs from New York to North Carolina and guns from North Carolina to New York. Perfecting this case required a great deal of surveillance and extensive investigation that might not have been possible if the multiple sale information were released

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[12] The Multiple Sales Database Sub-Module contains data used to develop leads to crimes and trends in trafficking, which require more time to develop than investigations concerning a trace. By contrast, data from the Trace Database Sub-Module concern firearms suspected of being used in a crime already committed. Therefore, with the exception of the nine data elements previously discussed, which are withheld for five years, the rest of the requested trace data can be released sooner than multiple sales data without compromising the intended purpose of collecting the data.

prior to the expiration of the two-year cushion. That is, non-Federal prosecutors, who are aggressively investigating firearms violations without ATF involvement, could have intervened in and inadvertently compromised the investigation, or the violators could have learned that they were under investigation. Moreover, premature disclosure of the multiple sales records could have caused the violators to change their method of operation, such as making single purchases of firearms (*e.g.*, having ten people purchase one firearm each instead of one person purchasing ten firearms), or moving to the secondary gun market such as flea markets and gun shows.

ATF's Withholdings Under FOIA Exemption 7(C) For Data From the Trace Database and Multiple Sales Database Sub-Modules

62. The information withheld under Exemption 7(C) from both the Trace Database Sub-Module and the Multiple Sales Database Sub-Module consists of the names and/or addresses of third parties in a law enforcement database.

63. ATF's concern regarding the privacy interests at issue in this litigation is consistent with other Congressional limitations on the Government's maintenance and disclosure of personal information, such as names and addresses, namely, the Privacy Act of 1974, 5 U.S.C. § 552a (1994 & Supp. IV 1998), the Treasury Department Appropriations Act, Pub. L. No. 95-429, 92 Stat. 1002 (Oct. 10, 1978), and the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449

(May 19, 1986) ("FOPA," codified at 18 U.S.C. § 926(a)).

64. The Privacy Act restricts the disclosure of personally identifiable records maintained by federal agencies. The Trace Database Sub-Module and the Multiple Sales Database Sub-Module each is a "system of records"—"a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). Because the data withheld under Exemptions 6 and 7(C) are identifiable by name and/or address and are not required to be disclosed under the FOIA, they are entitled to protection under the Privacy Act.

65. In addition, Congress consistently has restricted ATF's use of firearms licensee records in order to protect the privacy interests of lawful gun owners. The Treasury Department's annual appropriations have been conditioned expressly on the prohibition against the use of appropriated funds to consolidate or centralize records concerning the acquisition and disposition of firearms maintained by FFLs. *See, e.g.*, Pub. L. No. 95- 429, 92 Stat. 1002 (Oct. 10, 1978); Pub. L. No. 106-58, 113 Stat. 430, 434 (Sept. 29, 1999). In fact, the privacy interests of firearms owners is of such Congressional importance that Congress ordered the U.S. General Accounting Office ("GAO") to conduct an investigation of ATF to ensure the agency's compliance with "legislative restrictions on centralizing and consolidating

data from federal firearms licensee records." *See* U.S. Government Accounting Office, Report to the Chairman, Subcommittee on Treasury, Postal Service, and General Government, Committee on Appropriations, House of Representatives, *Federal Firearms Licensee Data: ATF's Compliance with Statutory Restrictions* 1 (Sept. 1996).

66. Likewise, in passing the FOPA, Congress explicitly found that "additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.'" Pub. L. No. 99-308, 100 Stat. 449.

67. ATF invokes Exemption 7(C) with respect to Recovery Location Data, Possessor and Associates Data, and Purchaser Identification Data (with the exception of the Purchase Date, for which only Exemption 7(A) is claimed) from the Trace Database Sub-Module and Purchaser Involved in Multiple Sales Data[13] from the Multiple

[13] Purchaser Involved in Multiple Sales Data consists of 11 data elements: Last Name, Middle Name, First Name, Name Suffix, Route Number, Apartment Number, Street Number, Street Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 83-86, 93-98, 102.

Sales Database Sub-Module. ATF does not release any of these data to the public under the FOIA because the minimal public interest in the disclosure of the personal information of individuals contained in these sub-modules does not outweigh the substantial privacy interests at stake. As indicated previously, many of the persons whose names and/or addresses are in the FTS are not suspects or defendants. They simply purchased or possessed firearms or resided near the recovery location of firearms that were subsequently traced for reasons unrelated to their activities. As a practical matter, ATF cannot distinguish the innocents from the suspects because it lacks sufficient information from the requesting agencies.

Recovery Location Data

68. With respect to the Recovery Location Data, ATF withholds the addresses where a firearm involved in a crime was recovered to protect the privacy interests of individuals who live or work at or near that location. The location where a firearm was recovered may be part of the crime scene or may concern the home or business address of the victim, suspect, witness, or an acquaintance thereof. However, ATF does not know whether the individuals who live or work near the recovery location have any connection to the crime other than the recovery of the firearm. For example, if a firearm is recovered in front of the home of an individual, it may be

that this individual has no connection to the firearm and that the criminal dropped or hid the gun on this individual's property. If ATF were to disclose the address of where firearms involved in traces were recovered, this individual could find himself wrongly linked in the public eye to the crime committed with the firearm. Given this individual's innocence in this example, such an association could subject him to considerable embarrassment and harassment.

69. Protection under Exemption 7(C) is necessary to protect the people who may live or work at the specific addresses listed in this category. Although the person(s) at the listed address may have been wholly unconnected to the crime, the mere mentioning of a person's specific identifying information in a law enforcement file, such as Recovery Location Data, can reasonably be expected to invade an individual's privacy.

70. Against these privacy interests, ATF has balanced any possible "public interest" in the Recovery Location Data, as that term has been interpreted by the Courts. The Recovery Location Data is of minimal, if any, public interest because the disclosure of the data tells the public nothing about the operations of ATF. Indeed, very little of the data concerns ATF investigations but rather those of the 17,000 other Federal, State, local, and international law enforcement agencies that submit trace requests to ATF. In light of the absence of any public interest in these addresses, the protection of privacy interests under Exemption 7(C) prevails.

Possessor and Associates Data

71. For similar reasons, ATF withholds the Possessor and Associates Data under Exemption 7(C). The privacy interests of possessors and associates data in their names and addresses outweigh the negligible light this information sheds upon the operations of government. The public release of this information could subject the persons named to harassment and stigma. The possessor of the firearm ultimately may be exonerated in the course of a criminal investigation. Even if the police and/or judicial systems have cleared the possessor of any wrongdoing, the mere mentioning in a law enforcement file may subject the one-time suspect to harassment and embarrassment.

72. Furthermore, the "associates" listed may become or may have been crucial government witnesses or informants in an investigation. Revealing their names could lead to harassment and intimidation by those who would prefer the associate not cooperate with investigators or to false allegations of the person's guilt.

73. In addition, because the agency requesting the trace does not inform ATF of whether possessors and their associates are ever indicted or convicted of any offense, ATF has no way of knowing whether the law enforcement agency requesting the trace believes the possessor or associate to have had any role in the crime. Possessor and associate names and addresses are often mentioned in the Trace Database Sub-Module simply because they were the last known

possessor of the traced firearm or an associate of such person. These individuals simply could be innocent third parties in the wrong place at the wrong time. Given the lack of public interest in the names and addresses of possessors and associates whose relationship to the investigation is unknown, the balance under Exemption 7(C) justifies withholding of these data.

Purchaser Identification Data

74. The Purchaser Identification Data, which consists of the names and addresses of purchasers of traced firearms, are also entitled to protection under Exemption 7(C). This category of data identifies the original purchaser of the gun involved in a crime, even if that purchaser had no connection to the crime whatsoever. Thus, a person who purchased a firearm legally in 1993 and sold the gun in 1995 would appear in the Trace Database Sub-Module as a purchaser, even if the firearm were recovered in a crime and submitted for a trace in 2000. The purchaser does not necessarily have any connection to the crime or to the investigation other than at one time having purchased the traced firearm. Revealing the names of these potentially law-abiding citizens jeopardizes their legitimate privacy interests, as they simply may have engaged in the entirely legal conduct of purchasing a firearm that ended up in the wrong hands at some later time. The association of such an individual with a crime involving a firearm, which the public may infer from the data, could lead to embarrassment and stigma for the purchaser. These are the very kinds of concerns

that motivated Congress to enact the above-referenced appropriations restrictions.

Purchaser Involved in Multiple Sales Data

75. As with the Trace Database Sub-Module data discussed above, ATF never releases the Purchaser Involved In Multiple Sales Data from the Multiple Sales Database Sub-Module under the FOIA because the minimal public interest in the disclosure of this personal information does not outweigh the substantial privacy interests at stake.

76. The purchase of multiple firearms does not by itself constitute illegal activity in any way. However, ATF monitors this information as part of its long-term efforts to track illegal sales and trafficking patterns throughout the country. Revealing the names and addresses of those persons who have engaged in the entirely legal activity of purchasing multiple handguns would inevitably anger these law-abiding citizens and compromise the legitimacy of ATF as an agency that can be entrusted to maintain the confidentiality of its records.

77. Additionally, the privacy interests at stake are not outweighed by the public interest in the disclosure of the information. There is little public interest in the disclosure of names and addresses of citizens who have legally purchased firearms, as this information does not shed any light on ATF's conduct.

ATF's Withholdings Under FOIA Exemption 6 For Data From the Trace Database and Multiple Sales Database Sub-Modules

78. ATF invokes Exemption 6 to protect the same categories of data from the Trace Database Sub-Module and the Multiple Sales Database Sub-Module that are protected under Exemption 7(C): Recovery Location Data, Possessor and Associates Identification Data, Purchaser Identification Data, and Purchaser Involved in Multiple Sales Data. Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). With respect to the Recovery Location Data, Possessor and Associates Identification Data, Purchaser Identification Data, and Multiple Sale Purchaser Identification Data, ATF believes that the third parties' privacy interests in their names and addresses greatly outweighs the minimal public interest in the data. Moreover, there is no reason to believe that the public will obtain a better understanding of the workings of ATF by learning the names and addresses of private citizens who purchased or possessed a firearm involved in a trace, resided or worked where a traced firearm was recovered, or purchased a firearm as part of a multiple sale. Given the absence of any public interest in the data combined with the potential association of these individuals with wrongdoing, the release of the aforementioned data would constitute a clearly unwarranted invasion of privacy.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 9th day of Nov. 12, 2000.

/s/ DAVID L. BENTON
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